



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MPA/167741

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 31, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability/Office of the Inspector General (OIG) in regard to Medical Assistance (MA), a telephonic hearing was held on October 20, 2015, at Milwaukee, Wisconsin. The record was held open for 30 days to allow petitioner's mother time to submit additional information.

The issue for determination is whether the OIG correctly modified petitioner's prior authorization (PA) request for physical therapy (PT).

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: written submittal of: Kristen Derenne, PT, DPT  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner is 5 years old and is diagnosed with muscle weakness and kernicterus.
3. On May 5, 2015 the petitioner's private PT provider ([REDACTED]) submitted a PA request (PA# [REDACTED]) for petitioner to receive private PT twice weekly for 18 weeks.
4. On June 15, 2015 the OIG issued a notice to petitioner indicating that it was modifying the PA request to 8 dates of service because it did not find the level of PT requested to be medically necessary.

### **DISCUSSION**

Physical Therapy (PT) is covered by MA under DHS §107.16 of the Wisconsin Administrative Code. Generally it is covered without need for prior authorization (PA) for 35 treatment days per spell of illness. Wis. Admin. Code, DHS §107.16(2)(b). After that, PA for additional treatment is necessary. If PA is requested, it is the provider's responsibility to justify the need for the service. Wis. Admin. Code, DHS §107.02(3)(d)6.

In determining whether to grant prior authorization for services or equipment, the OIG must follow the general guidelines in DHS §107.02(3)(e). That subsection provides that the OIG, in reviewing prior authorization requests, must consider the following factors:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including Medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.

The key factor of the 12 listed above is "medical necessity", which is defined in the administrative code as any MA service under chapter DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability;  
and
- (b) Meets the following standards:

1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;

3. Is appropriate with regard to generally accepted standards of medical practice;
4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
5. Is of proven medical value or usefulness and, consistent with s. [DHS 107.035](#), is not experimental in nature;
6. Is not duplicative with respect to other services being provided to the recipient;
7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code, DHS §101.03(96m).

“Medically necessary” is therefore more of a *legal* term as opposed to a *medical* term. Therefore, while a medical professional or provider may conclude an item is “medically necessary” it is the OIG which must adjudicate the request and determine whether the item or service for which payment is sought meets the legal definition of “medically necessary.” In prior authorization cases the burden is on the person requesting the PA to demonstrate the medical need for the services. Wis. Adm. Code, DHS §§107.02(3)(d) and §106.02(9)(e)1.

In this case the OIG modified the PA request because it determined that the *level* of PT requested was not medically necessary. The OIG’s position was that the provider, [REDACTED], did not provide objective measures of petitioner’s impairments to show a baseline or to show why the skills of a private physical therapist is needed to treat those impairments. The agency’s basis for this is founded upon the rules about when a PA will be approved, which state in relevant part:

e) *Extension of therapy services.* Extension of therapy services shall not be approved beyond the 35-day per spell of illness prior authorization threshold in any of the following circumstances:

1. The recipient has shown no progress toward meeting or maintaining established and measurable treatment goals over a 6-month period, or the recipient has shown no ability within 6 months to carry over abilities gained from treatment in a facility to the recipient's home;...

Wis. Adm. Code §DHS 107.16(3)(e)1(emphasis added). The agency also cites Wis. Adm. Code, DHS §101.03(96m)6, 7, 8 and 9, cited above.

Indeed, I must agree with the agency’s decision here. The baselines given do not allow a reviewer to determine what the petitioner’s muscle strength is or what muscle(s) needs strengthening. This is why a baseline quantitative assessment is performed and subsequent assessments on the same or similar basis are necessary to demonstrate “progress”. This also would serve to show how *this* PT provider would benefit petitioner, when he also receives PT services at school. Without clinical information to identify petitioner’s baselines, gains or losses, the PA request is not supported.

Finally, petitioner’s mother, who clearly wants the best for her son, anecdotally described progress and regression for her son when he does not receive PT. However, that still does not provide us with *measurable* limitations. Petitioner is essentially at the mercy of the provider who is required to justify the requested services. The record was held open after the hearing to see if the provider could submit any further documentation to support the PA request, but the only information received was a statement from [REDACTED] stating, “As [REDACTED] has not been seen in OP PT since 8/25/15, while awaiting insurance

approval and w/the start of school, PT can not add any new data regarding his medical or functional status at this time.” Obviously, this does nothing to support the PA request made in May.

Based upon my review of the record in this case, I must agree with the OIG’s decision to modify the PA. The basic assertion of the OIG has been the lack of evidence that would justify the medical need for PT services in a clinical setting as requested. I agree that that information has not been presented. Therefore, I must conclude the requested PT in this case is not covered by the MA program. The OIG was therefore unable to approve all of the requested service.

I note for petitioner’s benefit that this is not a bar to submitting another PA request for PT or amending the current PA. The requesting provider will need to provide the basic documentation to support another request, however.

While petitioner may believe this to be unfair, it is the long-standing position of the Division of Hearings & Appeals that the Division’s hearing examiners lack the authority to render a decision on constitutional or equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

### **CONCLUSIONS OF LAW**

The agency correctly modified petitioner’s PA request for PT.

**THEREFORE, it is**

**ORDERED**

That the petition for review herein is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 23rd day of November, 2015

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\sKelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 23, 2015.

Division of Health Care Access and Accountability